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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update. The first of the new decade.

Occasionally, the Courts and Tribunals release judgments and decisions that, on the face of it, change the way that we think about VAT. The main headline of this week concerns such a case.

The Upper Tribunal has released its judgment in the case of News Corp UK & Ireland Ltd. This was an appeal by the taxpayer – the publisher of such newspaper titles as The Sunday Times and The Sun – from a decision of the First-tier Tax Tribunal (FTT). The issue was whether a digital representation of the print version of a newspaper ought to be classified as a newspaper itself and, thus, benefit from the zero-rate granted by UK VAT law. The FTT considered that a digital publication could not properly be regarded as a newspaper and dismissed News Corp's appeal. The Upper Tribunal has reversed that decision ruling that UK law is 'always speaking' – meaning that a digital publication of a newspaper should be treated the same as the printed version for VAT purposes.

It is possible that HMRC will appeal this judgment to the Court of Appeal but, in the meantime, the Upper Tribunal's judgment sets a binding precedent.

HMRC has also published guidance this week on the implementation of new regulations concerning the VAT treatment of call-off stock. This follows implementation of new EU rules from 1 January 2020. Businesses that hold call-off stock in different jurisdictions will need to familiarise themselves with these new rules.

Finally, the FTT has dismissed an appeal by Dixons Retail Ltd. The issue in this case concerned how Dixons should account for VAT on sales where payment was received by cheques that were subsequently dishonoured. Dixons argued that it was entitled to adjust its VAT return in accordance with its agreed bespoke retail scheme. HMRC argued that any such adjustments should only be made by making a claim under s80 of the VAT Act which imposes a four-year time limit.

The FTT agreed with HMRC and Dixon's appeal was dismissed.

Upper Tribunal – News Corp UK & Ireland Ltd

VAT – zero-rating of digital newspapers

There has been much debate over recent years on the subject of fiscal neutrality. From a VAT perspective, this essentially means that supplies of the same or similar goods or services should be treated in the same way. One example of such an argument recently is in relation to the supply of digital books and the Court of Justice ruled (in the Commission v Luxembourg case) that the supply of a digital book was not the same as the supply of the book in printed form. The printed version being a supply of goods, whereas the digital version was to be regarded as a supply of services. As such, treating the supply of each type of book differently for VAT purposes did not breach the principle of fiscal neutrality.

Despite that Court of Justice ruling. News Corp UK & Ireland (News Corp) considered that its supply of digital versions of its newspapers should, under UK law be regarded as the supply of a newspaper and benefit from the UK's zero-rating. HMRC disagreed and News Corp appealed to the First-tier Tax Tribunal (FTT). The FTT dismissed the appeal on the basis that the digital versions could not be classed as newspapers under UK VAT law. News Corp appealed to the Upper Tribunal and in a surprise judgment, the Tribunal has allowed News Corp's appeal.

The Upper Tribunal took the view that the proceedings in the Court of Justice in the Commission v Luxembourg case concerned the application by Luxembourg of a reduced rate of 3% whereas this case concerns the application of the UK's zero-rate. The UK was allowed to retain its zero-rate when it joined the EU in 1973 provided that the rate was applied for clearly defined social reasons. The publication of newspapers was regarded as being important for the promotion of literacy and education. The Tribunal considered that a digital version of a newspaper met that test and, as a consequence, it adopted the doctrine of 'always speaking'. This doctrine ensures that the interpretation of law develops to take account of technical and social developments since the original enactment. Here, the UK law on zero-rating of newspapers had remained unchanged since its introduction but it was necessary to read and interpret the law in light of the technological changes.

European VAT law was changed in 2016 to allow Member States a discretion to apply reduced rates to supplies of digital publications. However, the UK did not take advantage of that opportunity on the basis that it already applied the zero rate under the 'standstill' provision of Article 110 of the VAT Directive. HMRC argued that, logically, if Member States were only permitted to apply reduced rates from 2016, it was clearly not permitted prior to that date but the Tribunal dismissed that argument as reduced rates and the retention of the zero-rate fall under different Articles of the Directive.

In the Upper Tribunal's judgment, using the doctrine of 'always speaking', UK VAT law must be interpreted to include digital versions of newspapers the supply of which should, like the print versions, be zero-rated.

Comment – This is a major and important judgment which may have a much wider impact that just in the newspaper arena. The doctrine of 'always speaking' could apply to many supplies of goods and services where there have been technical and social developments since the original law was enacted.

In the circumstances, it is likely that HMRC will seek leave to appeal the judgment to the Court of Appeal. In the meantime, this judgment sets a binding precedent and can be relied upon by other parties.

HMRC Guidance

New VAT rules relating to 'call-off' stock

HMRC has issued new guidance in relation to the UK's implementation of the EU's VAT 'quick fixes'. Businesses involved in cross-border transactions of goods need to be aware of some important changes that came into effect on 12 January 2020.

Where goods are supplied on a 'call-off' basis – ie where goods are moved from one Member State to another and are shipped to a known customer for subsequent 'call-off' by that customer, the VAT rules have changed. From 1 January 2020 such a movement of goods will not give rise to a supply for VAT purposes until such time as the goods are called off by the customer provided that the goods are called off within 12 months. The change is intended to simplify VAT accounting for affected businesses and avoid the need for suppliers to have to register for VAT in the Member State in which the goods are stored.

HMRC states that there are a number of conditions that must be met in order to apply the new call-off rules to such movement of goods. For example, there must be a call-off agreement in place between the supplier and the customer, the movement must be in relation to an intended supply of the goods to that customer, the supplier must not have a business establishment in the customer's Member State, the customer must be registered for VAT in the Member State of destination, the movement of goods must be recorded in a special 'call-off' register and the customer's VAT number must be reported on an EC Sales list. Failure to comply with these conditions will mean that the new 'call-off' provisions will not apply to the particular movement of goods which would mean that the normal VAT rules would apply. This would, in turn, mean that the supplier is required to register for VAT in the customer's Member State.

Comment

The new 'call-off' stock rules is one of four measures aimed at simplifying VAT accounting in relation to cross-border trade.

Other new rules have also been introduced to simplify VAT accounting for 'chain' transactions, and to ensure that suppliers obtain and show customer's VAT numbers on invoices and report transactions on EC Sales Lists.

Finally, the rules have changed in relation to what is regarded as acceptable proof of the cross-border transport of goods.

Affected business need to familiarise themselves with these new rules and, where necessary, amend their accounting and reporting procedures.

First-tier Tax Tribunal – Dixons Retail Ltd – (Dixons)

Whether taxpayer entitled to adjust for dishonoured cheques

This well known High Street retailer operates a bespoke retail scheme to enable it to calculate the VAT due on sales. The agreement between Dixons and HMRC stipulated that the taxpayer was entitled to make an adjustment for supplies where the initial payment by the customer was by way of a cheque which was subsequently dishonoured. However, Dixons had failed to make such an adjustment and in 2011, it submitted a claim covering the period from 1997 to 2003. HMRC rejected that claim on the basis that it was made outside the statutory time limit. Dixons appealed to the First-tier Tax Tribunal but subsequently withdrew its appeal.

Dixons then adjusted its VAT return to take account of the adjustment for dishonoured cheques. It argued that the bespoke retail scheme constituted an agreement between itself and HMRC that VAT could be adjusted in any period. HMRC disagreed and rejected the claim.

The Tribunal agreed with HMRC. The only recourse for Dixons was for it to make a claim for a VAT refund under s80 of the VAT Act. This provision has a strict four year time limit and, as the VAT periods in question related to VAT quarters falling well outside that time limit, the claim was out of time. Whilst the bespoke retail scheme did not have a specific or express provision, the Tribunal concluded that the agreement reached between Dixons and HMRC should be interpreted as meaning that any adjustments to daily gross takings (to account for dishonoured cheques) could only be made in the next VAT accounting period.

The VAT at stake here is £1.8 million. As such, Dixons may seek leave to appeal this decision to the Upper Tribunal

Comment

VAT law allows for adjustments to be made to the VAT paid by suppliers in cases where the customer does not pay or only partially pays for the particular supply of goods or services. In the case of dishonoured cheques, then it is, clearly, a question of non-payment.

Under UK VAT law, a business may make a claim for VAT overpaid by submitting what is known as a s80 claim. There are, however, clear time limits for the submission of such claims – generally known as the four-year rule.

Dixons tried to argue that, in essence, its bespoke retail scheme agreement with HMRC somehow 'trumped' the provisions of s80. Unfortunately, the FTT disagreed and dismissed Dixon's appeal.

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